

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
-vs-)	Case No. CR-04-114-F
)	
MELVIN ELLIS HOLLY,)	
)	
Defendant.)	

ORDER

Before the court is the Motion for a New Trial (doc. no. 118), filed by defendant, Melvin Ellis Holly, on July 30, 2010, to which plaintiff, United States of America, has responded. Also before the court is the Motion for Requesting Appointment of Counsel Pursuant to Rule 28 U.S.C. § 1915(e)(1) (doc. no. 120), filed by defendant, Melvin Ellis Holly, on August 16, 2010, to which the court finds no response by the plaintiff is required.

Defendant seeks, pursuant to Rule 33(b)(1), Fed. R. Crim. P., a new trial based upon newly discovered evidence. The court finds that defendant's motion must be denied.

Defendant previously filed a motion for new trial based upon newly discovered evidence on October 1, 2009. The court denied the motion on October 13, 2009. In its order denying the motion, the court noted that defendant's motion appeared to be untimely as it was not filed within three years after the verdict or finding of guilty in defendant's criminal case. The court, however, declined to raise the issue *sua sponte*. *See*, Order, (doc. no. 105).

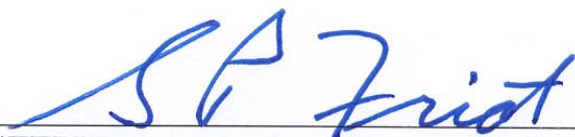
In its response to defendant's motion, the plaintiff argues that the defendant's motion is untimely as it was not filed within three years after the verdict finding

defendant guilty. The court agrees. Rule 33(b)(1) provides that “[a]ny motion for a new trial grounded upon newly discovered evidence must be filed within 3 years after the verdict or finding of guilt.” *See*, Rule 33(b)(1), Fed. R. Crim. P. Defendant’s motion, filed almost five years after the verdict, is clearly out of time.

Because defendant’s motion for new trial is untimely under Rule 33(b)(1) and must be denied on that basis, the court concludes that defendant is not entitled to appointment of counsel and his motion for appointment of counsel must also be denied.

Accordingly, the Motion for a New Trial (doc. no. 118), filed by defendant Melvin Ellis Holly, on July 30, 2010, and the Motion for Requesting Appointment of Counsel Pursuant to Rule 28 U.S.C. § 1915(e)(1) (doc. no. 120), filed by defendant, Melvin Ellis Holly, on August 16, 2010, are **DENIED**.

DATED August 24, 2010.



STEPHEN P. FRIOT
UNITED STATES DISTRICT JUDGE